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In the Supreme Court of the United States

OCTOBER TERM, 1989

PLYMOUTH STAMPING DIVISION,
ELTEC CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly found that petitioner's decision to subcontract its parts-assembly operation was a mandatory subject of bargaining under the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 870 F.2d 1112. The decision and order of the National Labor Relations Board (Pet. App. 10a-38a) and the decision of the administrative law judge (Pet. App. 39a-75a) are reported at 286 N.L.R.B. No. 85.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1989. The petition for a writ of certiorari was filed on June 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures and sells automotive parts and related products in Plymouth, Michigan. Since about 1960, the Union—Local 985, United Automobile, Aerospace and Agricultural Implement Workers of America—has been the exclusive collective-bargaining representative of petitioner's production and maintenance employees. Until 1980, about one-third of the 75 employees in the bargaining unit worked in petitioner's parts-assembly operation. Pet. App. 11a-12a, 42a.

In 1977, petitioner began to face serious financial problems. In August 1979, petitioner unsuccessfully sought from the Union mid-contract concessions with respect to wages, cost of living adjustments (COLA), and health benefits. Pet. App. 11a.[1] After those negotiations failed, petitioner decided to subcontract its parts-assembly operations. On February 8, 1980, petitioner agreed to move its parts-assembly work to facilities located in Wauseon, Ohio, that were leased by a firm named Stamtec. *Id.* at 2a, 13a, 49a.[2]

On Monday, February 11, 1980, petitioner gave the Union written notice that, "due to business and economic reasons," petitioner would terminate its part-assembly operation on February 15, and that affected employees (about 25) would be transferred or laid off in accordance with the collective-bargaining agreement. Pet. App. 12a. The notice concluded with the statement: "We are pre-

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[1] After the parties failed to reach agreement on the requested concessions, petitioner declared a moratorium on all contractual wage and COLA increases, and withheld the increases on September 10, 1979. The Union immediately filed a grievance, and petitioner paid the increases in December 1979. Pet. App. 12a, 43a-45a.

[2] Stamtec was incorporated in 1980. Petitioner's vice president and general manager was a 38% shareholder in Stamtec. Pet. App. 51a.

pared to discuss the matter with you further." *Ibid.* The Union then requested a meeting, but petitioner responded that the meeting could not be held until February 14. *Id.* at 12a, 45a.

At the February 14 meeting, petitioner's vice president stated that petitioner's problems resulted from a decline in sales, noncompetitive wages and benefits for parts-assembly employees, and high state taxes and workers' compensation costs. The Union asked what could be done to keep the assembly work in the plant. Petitioner stated that the Union would have to accept: (1) substantial reductions in wages and benefits, (2) changes in the grievance procedures, and (3) relief from various work rules. Petitioner further stated that its decision was not irreversible, but that for "economic reasons" it needed an answer by the next morning. Pet. App. 12a-13a. The Union requested a delay until the following Monday, February 18, when its president and chief negotiator would return from vacation, and the Union could hold a membership meeting. *Id.* at 12a-15a.

In a letter dated February 14, but not received by petitioner until February 20, the Union requested more specific information about petitioner's decision. In the meantime, after petitioner's attorney advised petitioner to proceed, the parts-assembly equipment was moved to Ohio on February 16 and 17. Pet. App. 13a. On March 1, petitioner and Stamtec entered into a formal agreement under which Stamtec leased petitioner's equipment needed to perform assembly work. *Id.* at 3a. Stamtec also took an option to purchase the equipment. Petitioner retained the right to terminate the lease and repossess the equipment, and also retained its customers' purchase orders in order to monitor quality control. *Id.* at 4a, 14a-15a. On July 1, Stamtec exercised its option and purchased the leased equipment for $132,430. *Id.* at 4a.

2. The Union filed unfair labor practice charges against petitioner. The Board ruled that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by failing to give the Union a meaningful opportunity to bargain over its February decision to subcontract its parts-assembly operation. The Board found that petitioner's February decision to subcontract its parts operation was motivated by labor costs, within the meaning of the Board's decision in *Otis Elevator Co.*, 269 N.L.R.B. 891 (1984), and was not "a fundamental change in the nature and direction of [petitioner's] business." Pet. App. 11a.[3] The Board noted that, "had [petitioner] obtained the specific cost concessions it desired, it would not have transferred its parts assembly operation despite the considerable arrangements previously made to effect the transfer." *Id.* at 16a. The Board stated that petitioner's decision to subcontract "came on the heels of unsuccessful attempts to obtain economic concessions from the Union." *Id.* at 15a. Moreover, petitioner admitted when it met with the Union on February 14, that "its decision was based on specific enumerated factors, in-

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[3] In *Otis Elevator*, Chairman Dotson and Member Hunter held that "management decisions, other than partial closings" need not be bargained over if they "turn[] upon a change in the nature or direction of the business." 269 N.L.R.B. at 892, 893 (plurality opinion). But such decisions that "turn[] upon labor costs" are subject to mandatory bargaining. *Id.* at 892. The Board in the present case concluded that petitioner's subcontracting decision was subject to mandatory bargaining "under any of the views expressed in *Otis Elevator*, including under the analysis set forth in the plurality opinion." Pet. App. 11a. Chairman Dotson dissented in this case because he did not agree that petitioner's February 1980 decision was based on labor costs. In his view, the facts established that the decision "turned * * * upon a significant change in the nature and direction of the business and therefore was not subject to mandatory bargaining." Pet. App. 36a.

cluding labor costs." *Ibid.* And the Board found that the "level of importance" petitioner attached to labor costs was made clear at the February 14 meeting when petitioner stated that the Union's agreement to substantial wage reductions and other concessions "would keep the parts assembly jobs in the plant." *Ibid.*

The Board rejected the argument that "[petitioner's] action represented a 'significant change in operations' so as to fall outside the scope of mandatory bargaining." Pet. App. 16a. The Board explained that, prior to the July 1 sale of the equipment, petitioner had subcontracted its parts-assembly work "in a manner which did not significantly alter [its] business." *Ibid.* The Board noted that—both before and after February 15—petitioner engaged in the business of performing parts-assembly work for its customers. In addition, petitioner: (1) prepared a stockpile of assembled goods to avoid a break in continuity, (2) retained both its customers' purchase orders and the right to control quality, and (3) "was not required to engage in a substantial capital restructuring" because of the lease arrangement. *Id.* at 17a. The Board, therefore, concluded that petitioner was required to bargain over its subcontracting decision.[4]

The Board agreed with petitioner, however, that the July 1 sale represented "a major entrepreneurial decision not amenable to resolution through the collective-bargaining process" (Pet. App. 32a), within the meaning of this Court's decision in *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Thus, the Board ruled that petitioner's "breach of its obligation to bargain with the Union concerning its decision regarding its parts assembly operation ceased as of 1 July." Pet. App. 32a. Accord-

[4] The Board found no merit to petitioner's claim that it had offered the Union a reasonable opportunity to bargain. Pet. App. 18a n.12.

ingly, the Board limited its remedial order; it ordered petitioner to give backpay to laid-off employees for the period of February 15 through June 30, 1980. *Id.* at 30a-31a.

3. The court of appeals enforced the Board's order. Pet. App. 9a. The court applied the principles set forth by this Court in *First Nat'l Maintenance Corp.* v. *NLRB, supra*, and in *Fibreboard Paper Prod. Corp.* v. *NLRB*, 379 U.S. 203 (1964). Pet. App. 5a-7a. The court agreed with the Board that: (1) the subcontracting did not significantly alter the nature of petitioner's work, (2) the decision to subcontract involved no significant investment of capital, and (3) the decision "did not commit petitioner to a new enterprise nor signify any permanent withdrawal from a previous line of business at least until the sale of the equipment on July 1." *Id.* at 7a. In addition, the court found it "most significant" that whether the Union would be willing to agree to concessions was critical to petitioner's decision to subcontract the work. *Id.* at 7a-8a.[5]

ARGUMENT

1. In *First Nat'l Maintenance*, on which petitioner relies (Pet. 7-9), the Court held that an employer's decision "to shut down part of its business purely for economic reasons * * * is *not* part of § 8(d)'s 'terms and conditions' * * * over which Congress has mandated bargaining." 452 U.S. at 686.[6] While it "intimate[d] no view as to other types of management decisions, such as plant relocations,

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[5] The court further found that substantial evidence supported the Board's finding that petitioner had not offered the Union a reasonable opportunity to bargain over the decision to subcontract. Pet. App. 9a. Petitioner does not challenge that ruling.

[6] Section 8(d) of the Act, 29 U.S.C. 158(d), requires the employer and the bargaining representative to "confer in good faith with respect to wages, hours, and other terms and conditions of employment."

sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts," *id.* at 686 n.22, the Court did establish a general framework for determining whether bargaining is required for those decisions. The Court said: "[I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." *Id.* at 679. .

The Court in *First Nat'l Maintenance* relied (452 U.S. at 676-679) on its earlier decision in *Fibreboard* that an employer's decision to subcontract maintenance work was a mandatory subject of bargaining. 379 U.S. at 215. The Court in *Fibreboard* noted (*id.* at 213):

> The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

In *Fibreboard*, the Court "also emphasized that a desire to reduce labor costs, which it considered a matter 'peculiarly suitable for resolution within the collective bargaining framework,' was at the base of the employer's decision to subcontract." *First Nat'l Maintenance*, 452 U.S. at 680 (quoting *Fibreboard*, 379 U.S. at 214).

The Board's decision here follows directly from this Court's decisions in *Fibreboard* and *First Nat'l*

Maintenance. Indeed, the only difference between this case and *Fibreboard* is that the subcontracted work here was performed away from the plant. But petitioner made it clear to the Union that there were no barriers to returning the work to the plant if concessions could be worked out. Thus, this case is indistinguishable from *Fibreboard.* In both cases, the employer "replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment." 379 U.S. at 213.

Contrary to petitioner's contention (Pet. 7-8), the Board did not require bargaining over the subcontracting decision simply because petitioner showed a concern for labor costs. Rather, the Board found that petitioner's decision to subcontract its parts-assembly operation, while retaining ownership of the equipment and control of its customers' orders, did not involve any significant change in petitioner's operations. See Pet. App. 16a. Nor did it significantly alter the scope or direction of petitioner's business. *Ibid.* In view of those findings, and the additional finding that the decision did turn on the availability of cost concessions from the Union (*ibid.*), petitioner's decision to subcontract work presented a classic case where the benefits of collective bargaining "outweigh[] the burden [it] place[s] on the conduct of the business." *First Nat'l Maintenance*, 452 U.S. at 679.

2. The decision below does not conflict with the decisions of any other court of appeals. In *Arrow Automobile Industries, Inc.* v. *NLRB*, 853 F.2d 223, 230 (4th Cir. 1988), the court held that the employer's decision to close one of its plants was a "partial closing" within the meaning of *First Nat'l Maintenance*. That holding is entirely consistent with the result in this case. Here, the Board ruled that petitioner's July 1980 sale of its parts-assembly

equipment was a partial closing of its business and therefore was not a mandatory subject of bargining.[7]

In any event, the court of appeals in *Arrow* observed that, although labor costs played a part in the employer's decision to close a plant, another factor was a 40% decline in the market served by that plant. The court stated that there was "no reason to believe that bargaining could have had any effect on this aspect of [the] decision." 853 F.2d at 230. In this case, as the Board found, petitioner made it clear that its decision could be changed if the Union agreed to a reduction in labor costs.

The other cases that petitioner cites (Pet. 12) are also not in conflict with the decision here. *Royal Typewriter Co.* v. *NLRB*, 533 F.2d 1030, 1038 n.9, 1039 (8th Cir. 1976), involved an employer's decision to shut down certain operations because of economic reasons unrelated to high labor costs. And in *NLRB* v. *Transmarine Navigation Corp.*, 380 F.2d 933, 936 (9th Cir. 1967), the employer "discontinue[d] its operations and relocate[d] in a different area as a minority partner" in order to keep a valued customer. None of those cases considered the type of management decision at issue here—*i.e.*, one motivated by labor costs that results in "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment." *Fibreboard*, 379 U.S. at 215.

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[7] Petitioner's characterization of its February decision as a "business termination decision" (*e.g.*, Pet. 7) is incorrect. The decision to terminate part of its business was not effectuated until the July 1 sale, and the Board held that the obligation to bargain ceased as of that date.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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